

Amendment No. 1 to HB2369

Vaughan

Signature of Sponsor

AMEND Senate Bill No. 2161*

House Bill No. 2369

by deleting all language after the caption and substituting:

WHEREAS, the General Assembly finds that social media platforms represent an extraordinary advance in communication technology for Tennesseans and have become ubiquitous in American society; and

WHEREAS, the General Assembly finds that users should be afforded control over their social media accounts as social media platforms provide unprecedented avenues for the dissemination of speech; and

WHEREAS, the General Assembly finds that social media platforms have transformed into the new public town square, where Tennesseans increasingly rely on such platforms to express their opinions; and

WHEREAS, the General Assembly finds that social media platforms have become as important for conveying public opinion as common carriers have become for supporting modern society, such as utility and telephone companies; and

WHEREAS, social media platforms have unprecedented and concentrated control over speech and possess substantial market power in this arena; and

WHEREAS, our legal system and its British predecessor have long subjected certain businesses, known as common carriers, to special regulations, including a general requirement to serve all comers; and

WHEREAS, the Supreme Court of the United States suggested long ago that common carriage regulation may be justified for industries not historically recognized as common carriers when the industry or business by circumstances and its nature rise from being a private entity to one of public concern; and

WHEREAS, there is clear historical precedent for regulating communication networks in a similar manner as traditional common carriers. Telegraphs, for example, were regulated as common carriers after the American Industrial Revolution because they resembled railroad companies and other common carriers, and were bound to serve all customers alike, without discrimination; and

WHEREAS, social media platforms that hold themselves out to the public resemble traditional common carriers. Although digital instead of physical, social media platforms "carry" information from one user to another, or even thousands of others; and

WHEREAS, the concentration of market power among a handful of social media platforms gives such platforms enormous control over speech and its dissemination by hundreds of millions of users. Such platforms control speech by suppressing content by deindexing or downlisting a search result and by steering users away from content by manually altering search results and algorithms. Furthermore, such platforms can greatly narrow a person's information flow through similar manipulation, or disrupt the sale and distribution of books, e-books, and other literature and information, in a manner that can impose cataclysmic consequences on authors and other content creators by blocking a listing or access to a website, platform, or social media account; and

WHEREAS, if the analogy between common carriers and social media platforms is correct, then laws that restrict a platform's ability to exclude users are appropriate and necessary; and

WHEREAS, the General Assembly finds that social media platforms are common carriers that unfairly censor, shadow ban, deplatform, or apply post-prioritization algorithms to Tennessee candidates, Tennessee users, and Tennessee residents, and that such platforms are not acting in good faith; and

WHEREAS, the General Assembly finds that this State has a substantial interest in protecting its residents from inconsistent and unfair actions by social media platforms that hold themselves out to the public at large and have risen to become institutions of significant public interest; and

WHEREAS, the General Assembly finds that this State must vigorously protect Tennesseans and the public at large by ensuring that common carriers, including social media platforms, do not discriminate against their users; now, therefore,

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 65, is amended by adding SECTIONS 2-7 as a new chapter.

SECTION 2.

As used in this chapter:

(1) "Algorithm" means a mathematical set of rules that specifies how a group of data behaves and that:

(A) Assists in ranking search results and maintaining order; or

(B) Is used in sorting or ranking content or material based on relevancy or other factors instead of using published time or chronological order of the content or material;

(2) "Candidate" means an individual who runs or seeks to qualify for public office;

(3) "Censor" means:

(A) An action taken by a social media platform to delete, regulate, restrict, edit, alter, inhibit the publication or republication of, suspend a

right to post, remove, or post an addendum to content or material posted by a user; or

(B) An action to inhibit the ability of a user to be viewable by, or to interact with, another user of the social media platform;

(4) "Commission" means the Tennessee public utility commission;

(5) "Deplatform" means the action or practice by a social media platform to permanently delete or ban a user, or to temporarily delete or ban a user, from the social media platform for more than twenty-one (21) consecutive days;

(6) "Journalistic enterprise" means an entity doing business in this state that:

(A) Publishes in excess of one hundred thousand (100,000) words available online with at least fifty thousand (50,000) paid subscribers or one hundred thousand (100,000) monthly active users;

(B) Publishes one hundred (100) hours of audio or video available online with at least one hundred million (100,000,000) viewers annually;

(C) Operates a cable channel that provides more than forty (40) hours of content per week to more than one hundred thousand (100,000) cable television subscribers; or

(D) Operates under a broadcast license issued by the federal communications commission;

(7) "Official" means an individual who is elected or appointed to a public office;

(8) "Post-prioritization":

(A) Means an action by a social media platform to place, feature, or prioritize certain content or material ahead of, below, or in a more or less prominent position than others in a newsfeed, a feed, a view, or search results; and

(B) Does not include such actions with respect to content and material of a third party, including other users, based on payments by the third party to the social media platform;

(9) "Shadow ban":

(A) Means an action by a social media platform, whether the action is determined by a natural person or an algorithm, to limit or eliminate the exposure of a user or content or material posted by a user to other users of the social media platform; and

(B) Includes such actions by a social media platform that are not readily apparent to a user;

(10) "Social media" means an electronic medium that allows users to create and view user-generated content, including, but not limited to, uploaded or downloaded videos, photographs, or internet links, posts, blogs, audio files, instant messages, or emails;

(11) "Social media platform":

(A) Means an information service, system, internet search engine, computer service, internet platform, or access software provider that:

(i) Provides or enables computer access by multiple users to social media; and

(ii) Operates as a legal entity doing business in this state; and

(B) Does not include:

(i) An internet service provider, electronic mail, or online service application;

(ii) A website consisting primarily of news, sports, entertainment, or other information or content that is not user-generated but is preselected or curated by the provider and for

which chat, comment, or interactive functionality is incidental to, directly related to, or dependent on the provision of that information or content; or

(iii) An online service, website, or application whose primary purpose is related to academic or scholarly research; and

(12) "User":

(A) Means a person who resides or is located in this state and who has an account on a social media platform, regardless of whether the person posts or has posted content or material to the social media platform; and

(B) Includes a journalistic enterprise.

SECTION 3.

(a) An operator of a social media platform authorizing users located in this state to post content or material on the platform shall, on or before April 1, 2023, and by January 1, 2024, for each year thereafter, obtain a certificate of public convenience and necessity as a social media common carrier.

(b) The commission shall prescribe by rule in consultation with the office of the attorney general and reporter the form on which application may be made for a certificate and the fee for the certificate. The commission may prescribe an equitable fee schedule based on a social media platform's gross annual revenue or the number of global individual platform participants.

(c) The operator of a social media platform shall disclose and file with the commission as part of the operator's application for a certificate all information relating to ownership and control of the company that is required to be filed with the federal communications commission.

(d)

(1) If the commission finds that a social media operator is operating in this state without a valid certificate, or has failed to provide the commission with all information required by this section or by rule of the commission regarding the application for a certificate or the operation of the social media platform, then the commission shall provide the operator with written notice of its failure to comply.

(2) If, after sixty (60) days of providing notice under subdivision (d)(1), the operator remains out of compliance, then the commission shall conduct a contested case hearing in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, and may fine the operator in an amount not to exceed fifty thousand dollars (\$50,000), and may exercise discretion in the amount of such fine based on the severity of the operator's noncompliance. The commission may levy such fine each thirty (30) days thereafter against the operator if the operator remains noncompliant.

SECTION 4.

(a)

(1) Except as otherwise provided in this chapter, a social media platform shall not intentionally deplatform or shadow ban a user of the social media platform if the basis of such action is rooted in political ideology, viewpoint discrimination, personal animus, or discrimination because of race, creed, color, religion, sex, age, or national origin.

(2) Subdivision (a)(1) does not prohibit a social media platform from taking action to restrict access to, or the availability of, material in accordance with 47 U.S.C. § 230 that the social media platform considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, regardless of whether the material is constitutionally protected.

(b) If the commission, by its own inquiry or as a result of the filing of a written complaint by a user, suspects that a violation of this section is imminent, occurring, or

has occurred, then the commission may investigate the suspected violation. Based on its investigation, the commission may conduct a contested case hearing to take appropriate action in accordance with subsection (c).

(c) If the commission finds a violation of subdivision (a)(1) after a contested case hearing, the commission may:

(1) Fine the operator of a social media platform:

(A) For a user who is not a candidate for public office or an official, twenty-five thousand dollars (\$25,000) for each day the social media platform is not in compliance with subdivision (a)(1); or

(B) For a user known by the social media platform to be a candidate for public office or an official, one hundred thousand dollars (\$100,000) for each day the social media platform is not in compliance with subdivision (a)(1); and

(2) Suspend or revoke the certificate of public convenience and necessity of the social media platform indefinitely until the platform's operator provides the commission with proof satisfactory to the commission that the social media platform is in compliance with subdivision (a)(1).

(d) If the commission finds that a social media platform has violated subdivision (a)(1) at the conclusion of the contested case hearing, a user may bring a private cause of action for a violation of subdivision (a)(1). In addition to the fines that may be levied under subsection (c), a court of competent jurisdiction may award the following to the user:

(1) Actual damages;

(2) Punitive damages, under § 29-39-104, if appropriate;

(3) Other forms of equitable relief, including injunctive relief; and

(4) Costs and reasonable attorney fees.

(e) If the commission investigates an alleged violation of this section, then the commission's investigative powers include, but are not limited to, the ability to subpoena algorithms used by a social media platform related to the alleged violation.

(f) This section must be enforced:

(1) To the extent not inconsistent with 47 U.S.C. § 230 or other applicable federal law; and

(2) Notwithstanding other state law.

(g) A social media platform is not subject to an administrative fine or to damages pursuant to an order of a court if the commission or court, as applicable, finds that the social media platform:

(1) Relied in good faith on 47 U.S.C. § 230 in censoring or banning a user and applied such censorship or ban fairly and equitably to all users of the social media platform who posted the same or substantially the same objectionable material;

(2) Has in place an adequate appeals process that is available to the user; and

(3) Agrees to restore the user's account in a reasonable period of time in accordance with rules prescribed under SECTION 5(a)(6).

SECTION 5.

(a) The commission shall promulgate rules in consultation with the office of the attorney general and reporter to effectuate the purposes of this chapter, including, without limitation, rules prescribing:

(1) Model policies for social media platforms for notifying a user that the user is being censored or banned;

(2) An appeals process by which a user can challenge censorship by a social media platform;

(3) Specific types of speech or posts that may be removed or censored;

(4) The process for reviewing an act of censorship by a social media platform;

(5) Circumstances under which a social media platform will not be subject to civil liability or administrative action under SECTION 4;

(6) Reasonable time periods by which a social media platform must restore a user's account after being censored or banned based on the nature of the content posted and the number of times the user has violated the policies of the social media platform; and

(7) Additional criteria for obtaining a license as a social media common carrier.

(b) The rules must be promulgated in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5.

SECTION 6. The middle division of the court of appeals has exclusive jurisdiction to hear an appeal of a final action of the commission after a contested case hearing under this chapter.

SECTION 7. If a provision of this act or its application to a person or circumstance is held invalid, then the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to that end, the provisions of this act are severable.

SECTION 8. For purposes of promulgating rules and carrying out administrative duties necessary to effectuate the provisions and intent of this act, this act takes effect upon becoming a law, the public welfare requiring it. For all other purposes, this act takes effect April 1, 2023, the public welfare requiring it.